1993

Brent A. Ferrin v. Keith B. Romney, dba Keith B. Romney & Associates: Brief of Appellee

Utah Court of Appeals

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IN THE COURT OF APPEALS

STATE OF UTAH

BRENT A. FERRIN, Plaintiff/Appellee, v. KEITH B. ROMNEY, individually and d/b/a KEITH B. ROMNEY & ASSOCIATES, Defendant/Appellant.	:	Appeal No.: 930369-CA

PRIORITY 15

BRIEF OF THE APPELLEE

APPEAL FROM THE THIRD JUDICIAL DISTRICT COURT

IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

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STATEMENT OF JURISDICTION

This Appeal rises from a final Judgment of the Third Judicial District Court, Salt Lake County, State of Utah, the Honorable Leslie A. Lewis presiding. The Utah Court of Appeals has jurisdiction over this Appeal pursuant to Utah Code Annotated §78-2a-3(2)(K).

STATEMENT OF ISSUES AND STANDARD OF REVIEW

Rule 24 of the Utah Rules of Appellate Procedure provides at subparagraph (b) that the brief of the Appellee not include a statement of issues, unless "the appellee is dissatisfied with the statement of the appellant". Appellee is not dissatisfied with the issues as stated. However, Appellee is dissatisfied the statement of the Appellant regarding the standard of review. As will be discussed below, the standard of review which should be applied in this case is a "clear abuse of discretion" or "clearly erroneous" standard. The authorities for this position are set out in the argument portion of this Brief.

STATEMENT OF THE CASE

A. NATURE OF THE CASE.

In this case the Plaintiff, Brent A. Ferrin, was employed by the Defendant, Keith B. Romney between 1986 and 1990. Mr. Romney owned and operated a condominium consulting firm in Salt Lake City. The agreement between these parties was that Mr. Ferrin

would receive 25% of all income earned by Mr. Romney during the time of employment of Mr. Ferrin. The agreement between the parties was that Mr. Ferrin would be entitled to receive this 25% when it was received by Mr. Romney.

The parties recognized that often the income, in the form of consulting fees, was earned by Mr. Ferrin and Mr. Romney but was not paid until some time later. Mr. Ferrin brought an action to recover his 25% share of income which had been earned by Mr. Ferrin and Mr. Romney, prior to the termination of employment, but which income was actually received after Mr. Ferrin left Mr. Romney's employ.

B. COURSE OF PROCEEDINGS BELOW.

This case was tried to a jury, commencing on January 25, 1993, and continuing through January 28, 1993. The matter was submitted to the jury in the form of a Special Verdict, which was returned in favor of Plaintiff and against the Defendant. A Judgment on Jury Verdict was granted in favor of Plaintiff and against Defendant, granting to Plaintiff a judgment of $102,681.42, together with a 20% share of all other monies received by the Defendant after that date on certain projects upon which income had been earned but not received.

SUMMARY OF ARGUMENT

The verdict of the jury was entered after the presentation of three full days of evidence. The verdict of the jury is well

within, and supported by, the evidence presented. The verdict of the jury should be allowed to stand.

The rulings of the trial court on both the admissibility of the evidence and on the taxing of costs are matters within the discretion of the trial court. They are to be overturned on appeal only if there has been a clear abuse of discretion and only when the decisions of the trial court are clearly erroneous.

Regarding the issue of the admissibility of Defendant's proposed Exhibits 57 and 58, the trial court was well within its discretion to rule that both Exhibits were irrelevant. This was a case involving the compensation arrangement between the Plaintiff and the Defendant and nothing more. The Defendant and the Plaintiff, on an ongoing basis, had been discussing the possibility of the Plaintiff's purchase of the Defendant's business. Both Exhibits 57 and 58 relate exclusively to the attempts of the Plaintiff and Defendant to negotiate a buy-out arrangement. Neither one of these documents relates to the negotiations between the parties as to the compensation arrangement of the Plaintiff as an employee of the Defendant. The compensation of the Plaintiff was a matter which had already been negotiated and set. Accordingly, the trial court was clearly within its authority to rule that negotiations, and documents reflecting those negotiations, regarding the attempts of the parties to buy or sell the business were irrelevant.

On the issue of the taxing of costs, the Appellate Courts of Utah have consistently ruled that the taxing of costs is a matter

within the sound discretion of the trial court. In this case, only actual travel costs of out-of-state witnesses were taxed. Plaintiff was clearly the prevailing party. Plaintiff should, therefore, be entitled to recover those costs.

ARGUMENT

POINT I
THE TRIAL COURT WAS CORRECT IN EXCLUDING EXHIBITS 57 AND 58.

A. THE APPROPRIATE STANDARD OF REVIEW.

As noted at the outset of this Brief, an issue is raised by the Defendant as to the applicable standard of review which this Court should apply in reviewing the exclusion of certain evidence. It is the position of the Plaintiff that the law in Utah is not subject to debate on this issue. Rulings as to the admissibility or exclusion of evidence are uniquely left to the sound discretion of the trial court and are not to be overturned, unless there is a clear abuse of that discretion showing the ruling of the trial court to be clearly erroneous.

Although the issue of the standard of review has been the subject of much scrutiny by the Appellate Courts, the position of the Courts has not changed. In the case of Bambrough v. Bethers, 552 P.2d 1286 (Utah 1976), the Utah Supreme Court stated the rule which is presently applicable:

> The judgment of the trial court will not be reversed unless it is shown that the discretion exercised therein has been abused. The trial court is given considerable discretion in deciding whether or not evidence submitted is relevant. Even if the evidence was erroneously

> admitted, that fact alone is insufficient to set aside a verdict, unless it has "had a substantial influence in bringing about the verdict". Id. at 1290.

The ruling in Bambrough was supported by the subsequent decision of the Utah Supreme Court in Terry v. Zions Co-Op. Mercantile Institution, 605 P.2d 314 (Utah 1979). There, the Court, in affirming the trial court's exclusion of certain evidence on relevancy grounds, held:

> It is generally conceded the trial court is more competent, in the exercise of this discretion, to judge the exigencies of a particular case, and, therefore, when exercised within normal limits, the discretion should not be disturbed. The general rule followed by this court is the judgment of the trial court will not be reversed unless it is shown that the discretion exercised therein has been abused. Id. at 322-23.

The later decision in McFarland v. Skaggs, 678 P.2d 298 (Utah 1984), reversed Terry on the issue of false imprisonment but did not reverse Terry on the issue of the admissibility of evidence.

The more recent decisions of the Utah Supreme Court have applied, with consistency, the abuse of discretion standard. Thus, in Nay v. General Motors Corp., 850 P.2d 1260 (Utah 1993), the Court, in affirming the trial court's exclusion of irrelevant evidence, stated:

> We begin our discussion of the recall and redesign evidence by stating the appropriate standard of review. We review a trial court's determination that evidence should be excluded . . . for abuse of discretion and reverse only if the ruling is beyond the bounds of reasonability. Id. at 1262.

Likewise, in State v. Thurman, 846 P.2d 1256 (Utah 1993), the Utah Supreme Court, in its Footnote No. 11 at page 1270, held that a

"correctness" standard is not to be applied as to the trial court rulings on admissibility of evidence and other factual findings.

Accordingly, the standard of review here to be applied is one which grants to the trial court broad discretion as to its rulings on relevancy, which rulings are not to be overturned unless there is a showing of clear abuse.

B. THE TRIAL COURT WAS CORRECT IN EXCLUDING EXHIBITS 57 AND 58.

With respect to the ruling of the trial court on the admissibility of Exhibits 57 and 58, Rule 103 of the Utah Rules of Evidence, provides:

> Error may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected . . ..

While Rule 401 of the Utah Rules of Evidence gives a broad definition of the term "relevance", the issue of what is relevant at trial is left to the sound discretion of the trial court. The reason for this principle is that there is no exact definition of the term relevance. Accordingly, discretion must be granted to the trial court to make determinations as the evidence is presented.

In the case at hand, the trial court allowed the Defendant to make a complete proffer as to Exhibits 57 and 58. (R. 1182.) The proffer made is not in dispute. The Defendant admitted that the two documents which he desired to admit were documents relating, not to the issue of the compensation arrangement between Plaintiff and Defendant, but, rather, to the attempts by the Plaintiff and Defendant to negotiate a sale of Defendant's

business. (R. 1183.) In other words, the documents did not deal with any issue before the trial court. The documents dealt with an issue which was completely separate and apart from the compensation issue at trial.

At no time did the Defendant allege or proffer that during the negotiations for the sale of the business the issue of the compensation of the Plaintiff arose. The Defendant did not allege, nor proffer, that the issue of what the Defendant should pay the Plaintiff for his efforts was an issue in the negotiations as to what the Defendant might be willing to sell his business for.

A decision as to the exclusion or admission of evidence is left to the sound discretion of the trial court because it is a matter of logic and experience, not a matter of law. See, e.g., State v. Abu-Isba, 235 Kan. 851, 685 P.2d 856 (1984). In State v. Wagner, 248 Kan. 240, 807 P.2d 139 (1991), the Kansas Supreme Court, dealing with the definition of relevance which is identical to Rule 401, stated:

> For evidence of collateral facts to be competent, there must be some natural or logical connection between them and the inference or result they are designed to establish. Id. at 142.

Likewise, in People v. Babbitt, 45 Cal.3d 660, 248 Cal.Rptr. 69, 767 P.2d 253 (1988), the Supreme Court of California, again dealing with the statutory definition of relevance identical to our own, declared:

> The trial court is vested with wide discretion in determining the relevance of evidence. [Citation omitted.] The court, however, has no discretion to admit irrelevant evidence. [Citation omitted.] Speculative inferences that are derived from evidence cannot be

> deemed to be relevant to establish the speculatively inferred fact . . .. Id. at 263. (Emphasis added.)

The Trial Judge, Judge Lewis, accurately and adequately applied each of these principles in her ruling. The trial court correctly noted that the issue before the Court was the compensation agreement between Plaintiff and Defendant, and what monies Plaintiff was entitled to receive as a result of his agreement with the Defendant. (R. 1187A.) The trial court correctly noted that Exhibits 57 and 58 had nothing whatsoever to do with the compensation arrangement between Plaintiff and Defendant. (R. 1188.) Those documents dealt solely and exclusively with the issue of Plaintiff purchasing Defendant's business. As Judge Lewis stated:

> We are not talking about this agreement. We are not talking about an anticipated agreement that may or may not have been entered by the parties. We are talking about a specific compensation agreement that is not covered in this document. (R. 1188.)

Exhibits 57 and 58 were simply not helpful in proving any disputed fact. They were, in the classic sense of the word, irrelevant. The following facts, among others, support this conclusion:

1. Both documents dealt with negotiations for the purchase of the business, not with the issue of compensation between Plaintiff and Defendant.

2. Each of the documents were nothing more than a proposal, created as a part of a preliminary negotiation. No

agreement was ever entered into between Plaintiff and Defendant which even remotely resembled either Exhibit 57 or Exhibit 58.

3. The pertinent language from Exhibit 57 which Defendant thinks is important, deals with the hypothetical situation of the Defendant remaining with the company after he had sold it to Plaintiff. The language cited by the Defendant stands for the proposition that, if the Defendant remained with the Plaintiff after purchase of the business, the Defendant would be entitled to compensation. Defendant apparently argues that, since such proposal was made, it obviously shows that the agreement between Plaintiff and Defendant on Plaintiff's compensation was the same. (R. 1183.) Such a presumption is illogical and not supported by any other evidence.

4. Exhibit 58, was not even drafted by Plaintiff and does not constitute his words. It was made clear by counsel during the argument on this issue, that Exhibit 58 was a proposed draft prepared by an attorney for Plaintiff and that the language which the attorney placed in the document was not Plaintiff's language and was not approved by Plaintiff. Indeed, it was proffered that the Plaintiff would testify that the document was unacceptable, even to Plaintiff and was never used as a part of the negotiations. (R. 1187.)

Accordingly, there is only the most tenuous of connections between Exhibits 57 and 58 and the issue before the trial court. The documents were nothing more than discussion drafts. There was not evidence ever adduced to show that either document represented

the mind, will or desires of either party. It is illogical to presume that when two parties negotiate on subject A, without regard to subject B, there negotiations are somehow probative of the issues on subject B.

The parties were attempting to hammer out a buy/sell agreement. That buy/sell agreement did not include, in any way, the issue of the then-current compensation of the Plaintiff. The connection, therefore, between these documents and the issue of Plaintiff's compensation is non-existent.

C. EXHIBITS 57 AND 58 WERE PROPERLY EXCLUDED UNDER RULE 403.

Although not specifically mentioned by Judge Lewis, it is apparent that the ruling of the trial court excluding Exhibits 57 and 58, is also supported by Rule 403 of the Utah Rules of Evidence. Rule 403 provides as follows:

> Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

The Plaintiff believes that the trial court was clearly correct in ruling that the negotiations regarding the buy-out agreement were totally irrelevant to the issues being tried. However, it is also apparent that the exclusion of the evidence by the Trial Judge can be supported by the above-quoted Rule.

The trial court was faced with the task of focusing the jury on the issue of the amount of compensation to which the Plaintiff was entitled under his arrangement with the Defendant. The buy-

out negotiations between the parties were a separate event which was totally unconnected to the issue of Plaintiff's compensation. Therefore, allowing Exhibits 57 and 58 would unduly mislead and tend to confuse the jury. It would allow the jury to focus on an issue which was not presented and which was not necessary for a determination as to the compensation of the Plaintiff.

In addition, the admission of Exhibits 57 and 58 would have unduly delayed and complicated the trial. The trial court was aware that Exhibit 58, by the testimony of the Plaintiff, was a draft document put together by an attorney. The Plaintiff would have testified that the document was unacceptable to him and would not reflect the facts as he understood them. (R. 1187.) Admission of Exhibit 58 would have required the parties to call the attorney as a witness, thereby unduly delaying the trial and wasting the time of the Court and parties. Under Rule 403, such is an acceptable reason for denying the admissibility of evidence, especially in light of its highly questionable probative value.

D. ADMISSION OF EXHIBITS 57 AND 58 WOULD NOT HAVE ALTERED THE OUTCOME.

The Defendant is correct that to be reversible error, the exclusion of evidence must be shown to have a reasonable likelihood of affecting the outcome. See, State v. Verde, 770 P.2d 116 (Utah 1989). The Plaintiff believes that the ruling of the trial court on relevancy is sufficient and correct. However, assuming, for purposes of argument, that the trial court was in error, the error

must be shown to have been prejudicial. The Defendant has failed to make such a showing.

Even if Exhibits 57 and 58 had been admitted, they were of little probative value. Exhibit 57 talks about the compensation that Keith Romney would get if he stayed with Brent Ferrin after the purchase of the business. What Keith Romney would have received has nothing to do with what Brent Ferrin was receiving.

Exhibit 58, as has been argued above, was nothing more than a preliminary draft which was not even approved for circulation or use by the Plaintiff. It did not represent his present view of anything and was an unacceptable document. It was part of a preliminary negotiation for buy-out which never came to fruition.

At the same time, there was ample evidence that the Defendant had benefitted greatly from the efforts of the Plaintiff and that the income of the Defendant had substantially increased as a result of the Plaintiff's help. There was also an admission by the Defendant that Plaintiff would receive his share of the income which had been earned but not received.

The admission is contained in Exhibit 10-P. In Exhibit 10-P, the Defendant states:

> Brent A. Ferrin has been my executive vice-president since July, 1986, and as such receives 25% of the net income that Keith Romney Associates (KRA) earns. (Emphasis added.)

Later in the document, the Defendant admits that the Plaintiff will be entitled to his 25% share at some future date when money was received, stating as follows:

Therefore, Brent will be entitled to 25% ($75,000.00) at that time, with the balance becoming due at transfer of title.

E. CONCLUSION AS TO ADMISSIBILITY.

There is simply not space in this Brief to recount for this Court all of the evidence which was adduced in support of the position taken by the Plaintiff. This is the reason why the Appellate Courts of this State have consistently allowed broad discretion to the trial court in making determinations of relevancy and of admissibility under Rules 401, 402 and 403. The trial court was in a unique position to assess whether or not the documents, even if technically relevant, would add anything to this matter or would result in confusion, delay and wasted time. The trial court was in a unique position to be able to determine whether or not the documents would have any effect on the outcome, given the other overwhelming evidence presented at trial. Clearly, the trial court was correct and the exclusion of Exhibits 57 and 58 was not error.

POINT II
THE TRIAL COURT'S TAXING OF COSTS WAS APPROPRIATE.

During the course of the trial, Plaintiff called two non-party witnesses, Mr. Jim Vernes and Mr. Bruce McEntire. Both witnesses reside outside of the State of Utah. Their appearance was voluntary, at the request of the Plaintiff. Their testimony was clearly necessary in order to prove all of the elements of the case, including compensation and the amount thereof.

The Plaintiff admits that in its Memorandum of Costs the actual travel expenses of both witnesses are included for a total of $1,142.95. The Court allowed costs of $1,773.85. The Plaintiff therefore assumes that the Defendant has no quarrel with the remainder of the costs incurred, but objects only to the travel expenses of these two witnesses. Plaintiff also assumes that the Defendant would have no objection to the taxing of costs at twenty-five cents per mile, one way, within the State of Utah, for each witness.

The award of costs is governed by Rule 54(d)(1) of the Utah Rules of Civil Procedure. The issue of which costs are to be allowed is defined by the case law.

This Court's recent decision in Morgan v. Morgan, 795 P.2d 684 (Utah App. 1990), is helpful. In Morgan, this Court noted that the award of costs is reviewed under a "abuse of discretion" standard. This Court also noted, in Morgan, that the rule on costs is not as strict as the Defendant would argue. The standard to be applied, in accordance with the ruling in Morgan, is as follows:

> Costs are generally allowable only in the amounts and in the manner provided by statute, but the [Utah] Supreme Court has taken the position that the trial court can exercise reasonable discretion in regard to the allowance of costs; and that it has a duty to guard against any excesses or abuses in the taxing thereof. Id. at 686.

The trial court has not abused its discretion in this regard. The testimony of Mr. Vernes and Mr. McEntire were entirely necessary to the proving of Plaintiff's case. Without their testimony, Plaintiff would have had less of a chance of prevailing.

The Defendant argues that the travel costs of the witnesses are eliminated by §21-5-4, Utah Code Annotated. However, to tax costs on the basis of twenty-five cents per mile for each mile traveled inside of the State is arbitrary, if not impossible. Each of these Defendants traveled from outside of the State of Utah. The exact route taken by Mr. McEntire is unknown. The route taken by Mr. Vernes was an airline route. The exact number of miles is also unknown. It is, therefore, impossible to compute the miles at twenty-five cents, one way only. To do so results in an improper and artificial calculation.

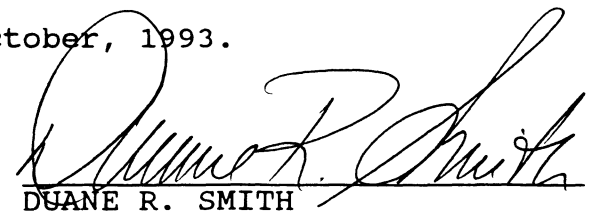
Accordingly, this Court should allow the trial court's discretion in this matter and allow the actual expenses of travel incurred by these witnesses. This Court's ruling in Morgan give just such discretion.

CONCLUSION

This matter was tried to a jury for approximately three days. The Defendant was given every opportunity to produce relevant evidence. On the issue of Exhibits 57 and 58, the trial court ruled that the documents themselves were irrelevant. However, the trial court did allow the Defendant to ask the witness, for impeachment purposes, whether his understanding of compensation was consistent with the language found in the Exhibits. (R. 1188.) The Defendant did not choose to follow the Court's ruling in that regard. Accordingly, the Defendant should not be allowed to complain, now, that he was prejudiced in some manner.

The judgment of the trial court is founded upon competent evidence and should be allowed to stand.

DATED this 18th day of October, 1993.



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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Brief of Appellee was hand-delivered to the following individual at the address shown below this 18th day of October, 1993.

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